Mohd Ismail bin Abd Ghani (would like to be known in the identity card as Saravanan a/l Balakrishnan) v Ketua Pengarah Pendaftaran Negara & Anor

HIGH COURT (KUALA LUMPUR) — JUDICIAL REVIEW NO R1–25–363 OF 2009
AZIAH ALI J
10 JANUARY 2011

Administrative Law — Judicial review — Certiorari — Omit 'Islam' from identity card — Application refused by first respondent — Whether application fell within realm of Shariah law — Whether within purview of Shariah court — Whether decision of first respondent unreasonable — Whether amenable to an order of certiorari

Civil Procedure — Judicial review — Application for leave — Extension of time — Application to omit 'Islam' from identity card refused by first respondent — Delay of six-months in filing application against decision of first respondent — Whether compliance of 40-day time period in O 53 r 3(6) of the Rules of the High Court 1980 ('RHC') mandatory — Whether delay justified — Whether O 1A of the RHC could be relied to supersede O 53 r 3(6) — Rules of the High Court 1980 O 1A & O 53 r 3(6)

The applicant applied to the first respondent to amend his name to omit the word 'Islam' from his identity card. The applicant alleged that he has never professed Islam but was brought up as a Hindu and practices the Hindu way of life. He stated that although he was born to an Indian Muslim father and his mother a Hindu, his parents were never married according to Islamic rites and he was therefore illegitimate. The first respondent however, rejected the application on the ground that an application for a change of name due to conversion out of Islam must be accompanied by a letter from either the Majlis Agama Islam or the Shariah court confirming such conversion out of Islam. The applicant applied for judicial review under O 53 of the Rules of the High Court 1980 ('the RHC') for an order of certiorari to quash the decision of the first respondent. However, as there was a delay of approximately six months in making the application, the applicant sought for an extension of time to apply for leave. The attorney general raised objections to the applicant's application for extension of time on the ground that the applicant has failed to satisfactorily explain the delay. The attorney general further raised the issue that this court has no jurisdiction to hear this matter as the subject matter falls within the jurisdiction of the Shariah court. The reason for the delay according to the applicant was due to his inability to find a lawyer and his work commitments

that made it difficult for him to obtain leave to meet up with his lawyer. The applicant further stated that the delay caused no prejudice to any party as the matter of his religion was personal to him. The attorney general however, raised objections to the applicant's application for extension of time on the ground that the applicant had failed to satisfactorily explain the delay.

Held, dismissing the application with costs:

(1) Order 53 r 3(6)of the RHC specifically provided that an application for judicial review must be made within 40 days from when the decision is communicated to the applicant. The failure to comply with O 53 r 3(6) was not merely a technical non-compliance. The mandatory nature of the requirement of compliance with the time period specified under O 53 r 3(6) was reiterated by the Court of Appeal in *Menteri Besar Negeri Pahang Darul Makmur v Seruan Gemilang Makmur Sdn Bhd*. It follows that an applicant who seeks to impugn a decision of a public authority ought to act promptly (see para 8).

(2) Certain breaches of the rules are serious in that it may go to the very root or foundation of the legal process. If that happens, the court would be reluctant to exercise its discretion in favour of validating that breach. In respect of an application for judicial review, compliance with the time frame was fundamental. It goes to the starting point, that of jurisdiction to hear the application. Order 1A of the RHC cannot be relied on to supersede O 53 r 3(6) which is a rule mandatory in nature (see paras 9–10).

(3) The applicant's explanation did not satisfactorily account for the delay. It is immaterial whether the delay does not occasion any prejudice to the respondent or a third party. The submission of no prejudice caused was not a satisfactory explanation for delay in filing for judicial review. The applicant had failed to satisfactorily explain the reason for the approximately six months' delay in making this application. On this ground alone the application for extension of time ought to be dismissed. Consequently, the court had no jurisdiction to hear the application for leave (see para 11).

(4) The objection to the delay grounded on non-compliance with O 53 r 3(6) was a valid objection and it was within the right of the attorney general to raise the objection. The applicant's submission that the attorney general raised objection on the delay merely to prop up the main objection to the application on the ground of jurisdiction, was therefore without basis (see para 12).

(5) The matters raised by the applicant in support of his contention that he was not a Muslim are matters to be considered and proved before the Shariah court in accordance with *hukum Syarak*. The court had no

jurisdiction to determine the matters raised by the applicant in support of his contention that he was not a Muslim (see para 17).

(6) On the authority of the decision of the Federal Court in *Lina Joy v Majlis Agama Islam Wilayah Persekutuan & Ors*, the decision of the first respondent was not unreasonable and was therefore not amenable to an order of certiorari. It followed that this application was frivolous and vexatious and leave ought not to be granted (see para 18).

[Bahasa Malaysia summary

Pemohon telah memohon kepada responden pertama agar meminda namanya dengan meninggalkan perkataan 'Islam' daripada kad pengenalannya. Pemohon mengatakan bahawa dia tidak pernah menganut agama Islam tetapi telah dibesarkan sebagai seorang Hindu dan mengamalkan cara hidup seorang Hindu. Dia mengatakan bahawa walaupun dilahirkan kepada bapa seorang India Muslim dan ibu seorang Hindu, ibu bapanya tidak pernah berkahwin menurut ajaran Islam dan oleh itu dia dianggap anak luar nikah. Responden pertama walau bagaimanapun, telah menolak permohonan tersebut atas alasan bahawa permohonan pertukaran nama kerana untuk keluar dari Islam hendaklah disertakan surat dari Majlis Agama Islam atau Mahkamah Syariah mengesahkan murtad tersebut. Pemohon telah memohon semakan kehakiman di bawah A 53 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') bagi perintah *certiorari* untuk membatalkan keputusan responden pertama. Walau bagaimanapun, oleh sebab terdapat kelewatan lebih kurang enam bulan untuk membuat permohonan tersebut, pemohon telah memohon lanjutan masa untuk memohon kebenaran. Peguam negara selanjutnya menimbulkan isu bahawa mahkamah ini tiada bidang kuasa untuk mendengar perkara ini kerana ia terangkum bawah bidang kuasa Mahkamah Syariah. Sebab kelewatan menurut pemohon adalah kerana dia tidak dapat mencari peguam dan komitmen kerjanya yang membuatnya sukar mendapat cuti untuk berjumpa dengan peguamnya. Pemohon selanjutnya menyatakan bahawa kelewatan tersebut tidak menyebabkan prejudis kepada mana-mana pihak kerana perkara berhubung agamanya adalah peribadi kepadanya. Peguam Negara walau bagaimanapun, telah menimbulkan bantahan terhadap permohonan pemohon untuk lanjutan masa atas alasan bahawa pemohon telah gagal memberi penjelasan kukuh berhubung kelewatan itu.

Diputuskan, menolak permohonan dengan kos:

(1) Aturan 53 k 3(6) KMT secara spesifik memperuntukkan bahawa permohonan untuk semakan kehakiman hendaklah dibuat 40 hari dari tarikh keputusan disampaikan kedapa pemohon. Kegagalan mematuhi A 53 k 3(6) bukan setakat ketidakpatuhan secara teknikal. Sifat mandatori keperluan pematuhan dengan tempoh masa yang ditetapkan di bawah A 53 k 3(6) telah dinyatakan semula oleh Mahkamah Rayuan dalam kes *Menteri Besar Negeri Pahang Darul Makmur v Seruan Gemilang*

Makmur Sdn Bhd. Adalah diikuti bahawa pemohon yang memohon untuk mempersoalkan keputusan kuasa autoriti patut bertindak segera (lihat perenggan 8).

(2) Pelanggaran rukun tertentu adalah serius kerana ia mungkin menjejaskan akar umbi atau asas proses perundangan. Jika ini berlaku, mahkamah enggan melaksanakan busi bicaranya untuk mengesahkan pelanggaran itu. Berhubung permohonan untuk semakan kehakiman, pematuhan dengan rangka masa adalah penting. Ia patut berlaku dari mula lagi, iaitu dari bidang kuasa untuk mendengar permohonan. Aturan 1A KMT tidak boleh digunakan untuk mengatasi A 53 k 3(6) yang merupakan sifat rukun yang mandatori (lihat perenggan 9–10).

(3) Penjelasan pemohon tidak memberi sebab kelewatan yang memuaskan. Ia tidak penting sama ada kelewatan tidak menyebabkan prejudis kepada responden atau pihak ketiga. Penghujahan tiada prejudis telah berlaku bukan penjelasan yang memuaskan untuk kelewatan memfailkan semakan kehakiman. Pemohon telah gagal memberikan penjelasan yang memuaskan untuk kelewatan enam bulan bagi membuat permohonan ini. Atas alasan ini sahaja permohonan untuk lanjutan masa patut ditolak. Berikutan itu, mahkamah tiada bidang kuasa untuk mendengar permohonan untuk kebenaran (lihat perenggan 11).

(4) Bantahan terhadap kelewatan berdasarkan ketidakpatuhan A 53 k 3(6) adalah bantahan sah dan ia hak peguam negara untuk menimbulkan bantahan. Hujah pemohon bahawa peguam negara telah menimbulkan bantahan tentang kelewatan itu semata-mata untuk mewujudkan bantahan awal terhadap permohonan itu atas alasan tentang bidang kuasa, dengan itu tidak berasas (lihat perenggan 12).

(5) Perkara-perkara yang ditimbulkan oleh pemohon yang menyokong hujahnya bahawa dia bukan seorang Muslim merupakan perkara-perkara yang perlu dipertimbangkan dan dibuktikan di hadapan Mahkamah Syariah menurut hukum syarak. Mahkamah tiada bidang kuasa untuk menentukan perkara-perkara yang ditimbulkan oleh pemohon bagi menyokong hujahnya bahawa dia bukan seorang Muslim (lihat perenggan 17).

(6) Berdasarkan autoriti keputusan Mahkamah Persekutuan dalam kes *Lina Joy v Majlis Agama Islam Wilayah Persekutuan & Ors*, keputusan responden pertama bukan tidak munasabah dan oleh itu tidak perlu perintah certiorari. Adalah diikuti bahawa permohonan ini adalah remeh dan menyusahkan dan kebenaran tidak patut diberikan (lihat perenggan 18).]

Notes

For cases on certiorari, see 1(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 280–290.

For cases on judicial review in general, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4797–4807.

Cases referred to

Abdul Rahman bin Abdullah Munir & Ors v Datuk Bandar Kuala Lumpur & Anor [2008] 6 MLJ 704; [2008] 6 CLJ 805, CA (refd)

Chin Mee Keong & Ors v Pesuruhjaya Sukan [2007] 6 MLJ 193; [2007] 5 CLJ 363, CA (refd)

Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor [1992] 1 MLJ 1, SC (refd)

Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v Datuk Captain bin Hamzah Mohd Noor and another appeal [2009] 1 MLJ 625; [2009] 4 CLJ 329; [2009] 1 LNS 446, CA (refd)

Kaliammal a/p Sinnasamy lwn Pengarah Jabatan Agama Islam Wilayah Persekutuan (JAWI) dan lain-lain [2006] 1 MLJ 685; [2006] 1 CLJ 753, HC (refd)

Kamariah bte Ali dan lain-lain lwn Kerajaan Negeri Kelantan, Malaysia dan satu Lagi [2002] 3 MLJ 657; [2002] 3 CLJ 766, CA (refd)

Lina Joy v Majlis Agama Islam Wilayah Persekutuan & Ors [2005] 6 MLJ 193; [2005] 4 CLJ 666, CA (refd)

Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan dan lain -lain [2007] 4 MLJ 585; [2007] 1 SYA 3; [2007] 3 CLJ 557, FC (folld)

Malayan Banking Bhd v Koay Kang Chuwan & Anor [2010] 5 MLJ 46; [2010] 6 CLJ 172; [2010] 1 LNS 301, CA (refd)

Menteri Besar Negeri Pahang Darul Makmur v Seruan Gemilang Makmur Sdn Bhd [2010] 4 MLJ 360; [2010] 5 CLJ 123, CA (refd)

Mersing Omnibus Co Sdn Bhd v Minister of Labour and Manpower & Anor [1983] 2 MLJ 54, FC (refd)

Ravindran v Malaysian Examinations Council [1984] 1 MLJ 168, FC (refd)

Regina v Stratford-On-Avon District Council and another, ex parte Jackson [1985] 1 WLR 1319, CA (refd)

Soon Singh a/l Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor [1999] 1 MLJ 489; [1999] 2 CLJ 5, FC (refd)

Subramaniam Vythilingam v The Human Rights Commission of Malaysia (SUHAKAM) & Ors [2003] 6 CLJ 175, HC (refd)

Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors [2006] 5 MLJ 60, CA (refd)

Wong Koon Seng v Rahman Hydraulic Tin Bhd & Ors [2003] 1 MLJ 98, HC (refd)

Yahya bin Kassim v Government of Malaysia & Anor [1997] 3 MLJ 749, CA (refd)

Legislation referred to

Rules of the High Court 1980 O 1A, O 53, O 53 r 3(6)

K Shanmuga (Aston Paiva with him) (Kanesalingam & Co) for the applicant.
Nadia Tajuddin (Senior Federal Counsel, Attorney General's Chambers) for the attorney general.

Aziah Ali J:

INTRODUCTION

[1] The applicant was born to an Indian Muslim father. He avers that his mother is a Hindu. According to the applicant his parents were never married according to Islamic rites and he is therefore illegitimate. He was brought up as a Hindu and practices the Hindu way of life and has never professed Islam.

[2] On or about 10 Noevmber 2008 the applicant applied to the first respondent to amend his name to omit the word 'Islam' from his identity card. On 27 November 2008 the first respondent requested the applicant to submit a certified copy of *surat pengesahan bukan Islam* from Jabatan Agama Islam or an order from the Shariah court. The applicant failed to comply and by letter dated 21 April 2009 the first respondent refused the application (exh P12). According to the first respondent's letter the applicant's application had been rejected on the ground that an application for a change of name due to conversion out of Islam must be accompanied by a letter from either the Majlis Agama Islam or the Shariah court confirming such conversion out of Islam.

[3] By way of this application the applicant applies for judicial review under O 53 of the Rules of the High Court 1980 ('the RHC') for an order of certiorari to quash the decision of the first respondent made vide the letter dated 21 April 2009. However this application was filed on 24 November 2009, a delay of approximately six months. Hence vide prayer 'A' the applicant sought for extension of time to apply for leave. The attorney general raised objections to the applicant's application for extension of time on the ground that the applicant has failed to satisfactorily explain the delay. The attorney general further raised the issue that this court has no jurisdiction to hear this matter as the subject matter falls within the jurisdiction of the Shariah court.

EXTENSION OF TIME

[4] Learned senior federal counsel refers to O 53 r 3(6) of the RHC which provides as follows:

Rule 3 Leave (O 53, r 3)

A (6) An application for judicial review shall be made promptly and in any event within 40 days from the date when grounds for the application first arose or when the decision is first communicated to the applicant provided that the Court may, upon application and if it considers that there is a good reason for doing so, extend the period of 40 days.

B Learned senior federal counsel submits that pursuant to O 53 r 3(6) this application ought to have been filed on or before 31 May 2009. It is submitted that in the absence of an explanation to the court's satisfaction, the application for extension of time ought to be dismissed (*Mersing Omnibus Co Sdn Bhd v Minister of Labour and Manpower & Anor* [1983] 2 MLJ 54; *Wong Koon Seng v* C *Rahman Hydraulic Tin Bhd & Ors* [2003] 1 MLJ 98).

[5] For the applicant learned counsel in his written submissions submits that the delay is explained by the applicant in his inability to find a lawyer and his D work commitments. In paras 8 and 9 of his affidavit in support the applicant avers that he needed time to find a lawyer and his lawyer then needed time to look into his matter and to prepare the cause papers for this application. The applicant avers that he had difficulty getting leave to meet with his solicitor. The applicant further avers that any delay would not cause prejudice to any E party that would interfere with good and fair administration as the matter of his religion is personal to him. Counsel submits that O 1A of the RHC requires the court to have regard to the justice of a particular case and not only to technical non compliance of any of the rules. It is submitted that public interest in ensuring the applicant's constitutional right are respected far outweigh the F slight delay (*Regina v Stratford-On-Avon District Council and another, ex parte Jackson* [1985] 1 WLR 1319; *Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors* [2006] 5 MLJ 60). Counsel submits that the objection to the delay is not an appropriate ground to shut out the applicant from this court.

G **[6]** Learned senior federal counsel submits that, save for the flimsy excuse that it took the applicant some time to get assistance from a lawyer and he had difficulty obtaining leave from work, the applicant has not satisfactorily explained the delay. It is submitted that these are not good reasons to justify an extension of time. In the event the court finds the explanation for the delay H unsatisfactory, learned senior federal counsel submits that it follows that the court has no jurisdiction to hear the application for leave (*Ravindran v Malaysian Examinations Council* [1984] 1 MLJ 168).

[7] Order 53 r 3(6) specifically provides that an application for judicial I review has to be made within 40 days from when the decision is communicated to the applicant. I am unable to agree with the submissions by counsel for the applicant that failure to comply with O 53 r 3(6) is merely a technical non-compliance. In the case of *Subramaniam Vythilingam v The Human Rights Commission of Malaysia (SUHAKAM) & Ors* [2003] 6 CLJ 175 Abdul Malik

Ishak J (as His Lordship then was) referred to the stringent mandatory requirements and safeguards in O 53. His Lordship said as follows:

> It was rightly submitted on behalf of the defendants that by choosing to file encl (1), the plaintiff was deliberately attempting to get around the following stringent mandatory requirements and safeguards as enumerated in O 53 of the RHC:
>
> (a) the plaintiff would have to apply for leave of the court under O 53 of the RHC;
>
> (b) the leave application would have to be filed within 40 days from the date when the grounds of the application first arose; and
>
> (c) the plaintiff would have to serve his leave application on the attorney general's chambers.

[8] The mandatory nature of the requirement of compliance with the time period specified under O 56 r 3(6) is reiterated by Zaleha Zahari JCA and Jeffrey Tan JCA in the case of *Menteri Besar Negeri Pahang Darul Makmur v Seruan Gemilang Makmur Sdn Bhd* [2010] 4 MLJ 360; [2010] 5 CLJ 123.

Zaleha Zahari JCA said as follows:

> The High Court in its judgment was of the view that the 40 days specified under O 53 r 3(6) was not rigid. I am of the view the judge erred in ruling that the time frame prescribed by the rules is not rigid. I am in agreement with the appellant's counsel that compliance with the time frame prescribed by the rules is fundamental as it goes to jurisdiction (See *Mersing Omnibus Co Sdn Bhd v The Minister of Labour & Manpower & Anor* [1983] 2 CLJ 7; [1983] CLJ (Rep) 266).

His Lordship Jeffrey Tan JCA said, inter alia:

> It is imperative that an application for judicial review is made within time (*Ahmad Jefri Mohd Jahri v Pengarah Kebudayaan & Kesenian Johor & Ors* [2008] 6 CLJ 473).

Thus on the abovementioned authorities an applicant who seeks to impugn a decision of a public authority ought to act promptly. Counsel for the applicant relies on the case of *Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors*. However the later decision of the Court of Appeal in *Menteri Besar Negeri Pahang Darul Makmur v Seruan Gemilang Makmur Sdn Bhd* reflects the approach of the courts on the issue of compliance of O 53 r 3(6).

[9] Certain breaches of the rules are serious in that it may go to the very root or foundation of the legal process. If that happens, the court is reluctant to exercise its discretion in favour of validating that breach (per Abdul Malik Ishak JCA in *Malayan Banking Bhd v Koay Kang Chuwan & Anor* [2010] 5 MLJ 46; [2010] 6 CLJ 172; [2010] 1 LNS 301). In respect of an application for judicial review, compliance with the time frame is fundamental. It goes to the starting point, that of jurisdiction to hear the application (see *Yahya bin Kassim v Government of Malaysia & Anor* [1997] 3 MLJ 749).

[10] Counsel for the applicant relies on O 1A of the RHC. It is worthwhile to refer to the judgment of Zaki Tun Azmi CJ in the case of *Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v Datuk Captain Hamzah bin Mohd Noor and another appeal* [2009] 1 MLJ 625; [2009] 4 CLJ 329; [2009] 1 LNS 446 wherein His Lordship said as follows:

> The technical non-compliance of any rule may be remedied where there is an accidental omission or oversight by a party. A general provision such as O 1A of the RHC is for the court or judge to give heed to justice over technical non-compliance. It must not supersede a mandatory requirement of the Rules. Order 1A of the RHC cannot be invoked when a party intentionally disregards in complying with the Rules. Otherwise, parties would be encouraged to ignore the Rules.
>
> In the context of the Rules of the High Court 1980 the phrase '… technical non-compliance …' is thus a reference to non-compliance with a rule which is not fundamental or mandatory in nature.

Therefore I am of the view that O 1A cannot be relied on to supersede O 53 r 3(6) which is a rule mandatory in nature.

[11] Having considered the explanation for the delay, I find the applicant's explanation that he needed time to find a lawyer and his lawyer needed time to check his matter and his difficulty in getting leave to meet with his solicitor are not satisfactory to account for the delay. In my considered opinion it is immaterial whether the delay does not occasion any prejudice to the respondent or a third party. The submission of no prejudice caused is not a satisfactory explanation for delay in filing for judicial review. I agree with learned senior federal counsel that the applicant has failed to satisfactorily explain the reason for the approximately six months' delay in making this application. On this ground alone the application for extension of time ought to be dismissed. Consequently the court has no jurisdiction to hear the application for leave. In *Abdul Rahman bin Abdullah Munir & Ors v Datuk Bandar Kuala Lumpur & Anor* [2008] 6 MLJ 704; [2008] 6 CLJ 805, Abdull Hamid Embong JCA (as His Lordship then was) said that the court may exercise its jurisdiction only upon obligatory compliance with the imperative requirement of time set under O 53 r 3 of the RHC (see also *Ravindran v Malaysian Examinations Council*). Whether the application for an order of certiorari has merits or not is irrelevant.

[12] For the reasons stated above I allowed the objection by the attorney general. The application for extension of time is dismissed. On the submissions by counsel for the applicant that the attorney general raises objection on the delay merely to prop up the main objection to the application on the ground of jurisdiction, I find the submissions without basis. In my opinion the objection to the delay grounded on non-compliance with O 53 r 3(6) is a valid objection and it is within the right of the attorney general to raise the objection.

[13] In the event that I erred in my decision to refuse extension of time on account of the applicant's failure to satisfactorily explain the non-compliance of O 53 r 3(6), I will proceed to consider the other grounds raised by the learned senior federal counsel why this court ought not to grant leave.

JURISDICTION

[14] To my mind the first question is whether the issue of jurisdiction ought to be considered at the leave stage. I am guided by the judgment of James Foong JCA (as His Lordship then was) in the case of *Chin Mee Keong & Ors v Pesuruhjaya Sukan* [2007] 6 MLJ 193; [2007] 5 CLJ 363 wherein His Lordship dealt with the question whether the court ought to consider the issue of availability of alternative remedy at the leave stage. His Lordship opined that to summarily assign the issue of alternative remedy after leave has been granted would mean that the issue of availability of an alternative remedy would automatically be permitted at leave stage and to ignore the issue at leave stage and to proceed to the second stage after leave has been granted would go against established principles. His Lordship said:

> I am aware that this court in *QSR Brands Bhd v Suruhanjaya Sekuriti & Anor* [2006] 2 CLJ 532, has gone as far as to declare:
>
> In the light of these weighty authorities, it is manifestly clear that it is only at the hearing of the substantive motion for judicial review that the existence of an alternative remedy becomes relevant. A fortiori, it is a matter which does not fall to be considered on a leave application.
>
> But I am not inclined to accept such a wide proposition in the light of the authorities disclosed. This is too broad an interpretation given to the cases cited. To summarily assign this issue of an alternative remedy to a subsequent stage for consideration after leave has been granted would, in my view, mean that even cases which are bound to fail in limine on the issue of availability of an alternative remedy would automatically be permitted at leave stage. It must be reminded that there are only limited exceptions to the general rule that judicial review is not available where there is an alternative remedy by way of appeal. And to ignore this at leave stage and allow all cases of such nature to proceed to the second stage after leave is granted would go beyond established principles particularly that of *Mohamed Nordin bin Johan v Attorney General, Malaysia* which is a Federal Court case and the Supreme Court decision in *JP Berthelsen v Director-General of Immigration, Malaysia & Ors* [1986] 2 CLJ 409; [1986] CLJ (Rep) 160 which repeatedly states that the test is whether the application for leave is frivolous to merit the refusal of leave in limine. In my view, if the issue of an alternative remedy is raised at leave stage, it must still be considered in the light of this established test rather than leaving it completely for evaluation at the substantive hearing of the motion of certiorari after leave has been granted.

In the same case Low Hop Bing JCA in his dissenting judgment said:

> I am of the view that the High Court is at liberty and indeed duty bound to consider any point raised, including the alternative remedy point, at the first stage of leave application under O 53 r 3(1). The consideration of whether leave should be granted or refused in limine involves an exercise of discretion. That discretion must be exercised according to established judicial principles, having regard to all the facts and circumstances of each particular case.

Based on the aforementioned authority it is my considered opinion that I am obliged to consider the issue of jurisdiction raised by learned senior federal counsel at this stage.

[15] In support of submissions that leave ought not to be granted, learned senior federal counsel submits that this court is not the proper court to hear this matter as the subject matter of the application, ie whether the applicant is a Muslim, falls within the realm of Syariah law. Therefore the proper court to decide is the Shariah court (*Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1; *Soon Singh a/l Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999] 1 MLJ 489; [1999] 2 CLJ 5;*Kamariah bte Ali dan lain-lain lwn Kerajaan Negeri Kelantan, Malaysia dan satu Lagi* [2002] 3 MLJ 657; [2002] 3 CLJ 766).

[16] In *Soon Singh a/l Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* the Federal Court dealt with the jurisdictional question of which court is competent to make a declaration that a Muslim has converted out of Islam. Mohamed Dzaiddin FCJ (as he then was) said:

> … it does seem inevitable that since matters on conversion to Islam come under the jurisdiction of the Syariah courts, by implication conversion out of Islam should also fall under the jurisdiction of the same courts.

The case of *Soon Singh* has been affirmed by the Federal Court in *Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan dan lain-lain* [2007] 4 MLJ 585; [2007] 3 CLJ 557 as good law.

[17] The application made by the applicant to the first respondent is premised on his contention that he is not a Muslim though he was born to a Muslim father. The applicant states that his mother is a Hindu and his parents were never married according to Muslim rites. He states that he was never raised as a Muslim and has never professed the religion of Islam. I agree with the learned senior federal counsel that the matters raised by the applicant in support of his contention that he is not a Muslim are matters to be considered and proved before the Shariah court in accordance with *hukum Syarak*. In *Kaliammal a/l Sinnasamy v Pengarah Jabatan Agama Islam Wilayah Persekutuan (JAWI) dan lain-lain* [2006] 1 MLJ 685; [2006] 1 CLJ 753, Raus Sharif J (as His Lordship then was) said:

Saya juga berpendapat bahawa walaupun pemohon melalui afidavit-afidavit yang difailkan cuba menunjukkan bahawa si mati dalam tempoh yang dikatakan simati telah memeluk agama Islam, telah mengambil bahagian dalam upacara keagamaan Hindu, dan melakukan perkara yang bertentangan dengan agama Islam atau tidak melakukan perkara seperti yang sepatutnya dilakukan oleh orang Islam, tetapi perkara-perkara tersebut adalah persoalan mengenai undang-undang Islam. Sekali lagi bidangkuasa untuk menentukan perkara-perkara seperti itu adalah Mahkamah Syariah dan bukan Mahkamah Sivil.

For the reasons stated I agree with learned senior federal counsel that this court has no jurisdiction to determine the matters raised by the applicant in support of his contention that he is not a Muslim.

[18] Learned senior federal counsel further submits that the Court of Appeal in *Lina Joy v Majlis Agama Islam Wilayah Persekutuan & Ors* [2005] 6 MLJ 193; [2005] 4 CLJ 666 has held that the policy of the first respondent that a mere statutory declaration is insufficient for it to remove the word 'Islam' from the identity card of a Muslim is perfectly reasonable. On this basis it is submitted that the first respondent has not acted unlawfully and the application is frivolous and vexatious. I agree with the submissions. At the Federal Court (*Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan dan lain-lain* [2007] 4 MLJ 585; [2007] 3 CLJ 557; [2007] 1 SYA 38) three questions were posed for determination by the Federal Court as follows:

(a) Adakah Jabatan Pendaftaran Negara (JPN) berhak, mengikut undang-undang, mengenakan syarat supaya perayu mengemukakan suatu sijil atau suatu pengisytiharan atau perintah daripada Mahkamah Syariah yang memperakukan bahawa beliau adalah murtad sebelum perkataan 'Islam' di dalam kad pengenalan (KP) perayu dipadamkan (*deleted*)?

(b) Adakah JPN teiah dengan betulnya mentafsirkan kuasanya di bawah Kaedah-Kaedah Pendaftaran Negara 1990 (Kaedah-Kaedah 1990) khususnya k 4 dan k 14, untuk mengenakan syarat seperti yang tersebut di atas manakala ianya tidak diperuntukkan dengan secara jelasnya di dalam Kaedah-Kaedah 1990 itu?

(c) Adakah kes *Soon Singh a/l Bikar Singh lwn Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999] 2 CLJ 5 telah diputuskan dengan betulnya apabila ia mengguna pakai teori bidangkuasa tersirat yang dikemukakan di dalam kes *Md Hakim Lee lwn Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur* [1997] 4 CLJ Supp 419 dan tidak mengikut kes *Ng Wan Chan lwn Majlis Agama Islam Wilayah Persekutuan & Anor (No 2)* [1991] 3 CLJ 328 (Rep); [1991] 2 CLJ 1559; [1991] 3 MLJ 487 dan *Lim Chan Seng lwn Pengarah Jabatan Agama Islam Pulau Pinang dan satu kes yang lain* [1996] 3 CLJ 231 yang mengisytiharkan bahawa sekiranya tidak ada bidangkuasa yang jelas yang diberikan kepada Mahkamah Syariah, maka Mahkamah-Mahkamah Sivil hendaklah mengekalkan bidangkuasa mereka?

Ahmad Fairuz CJ in delivering the judgment of the court answered the three questions as follows:

(a) JPN berhak;

(b) JPN betul; dan

(c) Kes Soon Singh telah diputuskan dengan betulnya.

His Lordship said:

> Di peringkat ini, adaiah wajar bagi saya untuk menyatakan persetujuan saya dengan bahagian penghakiman majoriti yang menyatakan bahawa apa yang JPN mahu ialah suatu perakuan dari seseorang yang mempunyai kuasa untuk membuatnya dan jika JPN bertindak mengikut perakuan itu, maka JPN adaiah bebas dari sebarang kesilapan atau disaiahkan oleh awam dalam perkara yang sebegitu mustahak dan sensitif. Justeru itu penghakiman majoriti memutuskan bahawa *ketidakrelaan JPN bertindak tanpa perakuan pihak berkuasa agama Islam adaiah munasabah.*
>
> Dalam hal keadaan sedemikian, saya bersetuju dengan penghujahan peguam terpelajar responden-responden kedua dan ketiga bahawa *syarat supaya suatu sijil atau perisytiharan atau perintah daripada Mahkamah Syariah bahawa perayu telah jadi murtad bukanlah suatu keputusan yang tidak munasabah* sehinggakan sebegitu melampau dalam keingkaran terhadap logik atau standard moral yang diterima hingga tiada seorang yang waras yang telah menumpukan pemikirannya kepada persoalan yang perlu diputuskan itu boleh mencapai keputusan itu.
>
> Dan apa yang telah dilakukan oleh pegawai JPN adaiah hanya semata-mata untuk menentukan Perayu bukan lagi beragama Islam secara yang ditetapkan oleh Islam. Justeru itu, *saya tidak nampak bagaimana tindakan itu boleh dikatakan bertentangan dengan perkara 11(1)* yang dengan sendirinya memperuntukkan keperluan mematuhi kehendak-kehendak agama itu sebelum dia keluar dari agama Islam. Menganuti dan mengamalkan agama Islam sudah tentu bererti mengamalkan bukan saja aspek teologi dalam agama itu tapi juga undang-undang agama itu. (Emphasis added.)

Therefore on the authority of the decision of the Federal Court in *Lina Joy* the decision of the first respondent is not unreasonable and is therefore not amenable to an order of certiorari. I agree with the learned senior federal counsel that this application is frivolous and vexatious and leave ought not to be granted.

[19] Counsel for the applicant submits that in another case with similar facts (R4–216 of 2009) leave to apply for judicial review had been granted. I have perused the case file and in that case leave was granted by another judge. I am of the view that irrespective of the other case, I am not precluded from considering and making a decision on the issue whether or not leave ought to

be granted on the facts of this case.

CONCLUSION

[20] For the reasons adumbrated above in respect of the application for extension of time, I allowed the objection raised by the attorney general. The application is therefore dismissed. In the event that I erred in refusing the application for extension of time, for the reasons stated above I find that leave ought not to be granted. Costs of RM500 is awarded to the attorney general.

Application dismissed with costs.

Reported by Ashgar Ali Ali Mohamed